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In the Supreme Court of the United States

October Term, 1984

CINCINNATI BELL TELEPHONE COMPANY,
Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO,
Appellee.

ON APPEAL FROM
THE SUPREME COURT OF OHIO

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

This appeal is from a decision of the Supreme Court of Ohio in which an order of The Public Utilities Commission of Ohio was upheld in the face of a conflicting order of the Federal Communications Commission. The decision of the Supreme Court of Ohio presents two questions for this Court's review:

1. Whether Article III, the Full Faith and Credit Clause (Art. IV, § 1), and the Supremacy Clause (Art. VI, para. 2) of the Constitution of the United States, the full faith and credit statute (28 U.S.C. § 1738) and general principles of federal common law require that the Supreme Court of Ohio give res judicata effect to a decision of the United States Court of Appeals for the Fourth Circuit which involved the same parties and upheld the validity and preemptive effect of the order of the Federal Communications Commission.

2. Whether the Supreme Court of Ohio is required to give effect to the order of the Federal Communications Commission by reason of the Supremacy Clause (Article VI, para. 2) of the Constitution of the United States and 28 U.S.C. section 2342(1) and 47 U.S.C. section 402(a) which reserve to the United States Court of Appeals exclusive jurisdiction to determine the validity of the order of the Federal Communications Commission.

PARTIES BELOW

The parties below were Cincinnati Bell Telephone Company, appellant, The Public Utilities Commission of Ohio, appellee, and the Office of the Consumers' Counsel, intervenor-appellee. The Ohio Telephone Association filed a brief as amicus curiae.

CORPORATE AFFILIATIONS

Cincinnati Bell Telephone Company is a wholly-owned subsidiary of Cincinnati Bell Inc. American Telephone and Telegraph Company owns 16.1 percent of the outstanding common shares of Cincinnati Bell Inc.

Cincinnati Bell Enterprises Inc. is a wholly-owned subsidiary of Cincinnati Bell Inc. Cincinnati Bell Supply Company, a wholly-owned subsidiary of Cincinnati Bell Enterprises Inc., is a 49 percent partner in a joint venture with Anixter Bros., Inc. Cincinnati Bell Cellular Systems Company, a wholly-owned subsidiary of Cincinnati Bell Enterprises Inc., is a 46 percent partner in a joint venture with American Information Technologies Corporation.

Cincinnati Bell Inc., American Telephone and Telegraph Company, Anixter Bros., Inc. and American Information Technologies Corporation are publicly held corporations.

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OPINIONS BELOW

The opinion of the Supreme Court of Ohio affirming The Public Utilities Commission of Ohio's Entry on Rehearing is reported at 12 Ohio St. 3d 280, 466 N.E.2d 848 (1984). A copy of this opinion appears in the appendix at pages A1 through A25.

The Entry on Rehearing of The Public Utilities Commission of Ohio (the "PUCO Order") in which it refused to obey a Federal Communications Commission order preempting inconsistent state depreciation policies and rates is unreported. A copy of the PUCO Order appears in the appendix at pages A25 through A35.

The Opinion and Order of The Public Utilities Commission of Ohio in which it acknowledged that it was obliged to obey the Federal Communications Commission Preemption Order is unreported. A copy of this order appears in the appendix at pages A36 through A130. This Opinion and Order was reversed by the PUCO Order, *supra*.

JURISDICTION

A. The nature of the proceeding.

This dispute arises from the refusal of The Public Utilities Commission of Ohio (the "PUCO") to obey an order (the "Preemption Order") of the Federal Communications Commission ("FCC") which held that federal law preempts the states from prescribing a method of calculating depreciation of telecommunications equipment that is contrary to the method prescribed by the FCC. The validity of the Preemption Order was appealed to the United States Court of Appeals for the Fourth Circuit, the only court with jurisdiction to determine the validity of that order as provided by 28 U.S.C. section 2342(1) and 47 U.S.C. section 402(a). The Fourth Circuit upheld the

validity of the Preemption Order. *Virginia State Corporation Commission v. Federal Communications Commission,* 737 F.2d 388 (4th Cir. 1984), (Motion for Rehearing En Banc denied.)

Cincinnati Bell Telephone Company ("Cincinnati Bell") appealed to the Supreme Court of Ohio the validity of the PUCO Order in which the PUCO refused to obey the Preemption Order. Despite the prior judgment of the Fourth Circuit and despite the fact that all parties in the Ohio Supreme Court were also parties to the appeal in the Fourth Circuit, the Ohio Supreme Court upheld the PUCO Order. In so doing, the Ohio Supreme Court refused to apply federal law—that is, the Preemption Order and the statutory grant of exclusive jurisdiction in the Court of Appeals to review FCC orders.

On July 25, 1984, the same day that the Ohio Supreme Court issued its decision, Cincinnati Bell filed a notice of appeal to this Court and moved the Ohio Supreme Court for a stay of its judgment. The Ohio Supreme Court ultimately denied that motion. On August 2, 1984, acting on an application filed by Cincinnati Bell, Chief Justice Warren E. Burger granted a stay of the judgment below pending receipt of memoranda from the PUCO and the Office of the Consumers' Council (the "OCC") opposing the stay. On August 21, 1984, after receipt of such memoranda and a reply memorandum filed by Cincinnati Bell, Chief Justice Burger issued an order narrowing the scope of the stay to the depreciation issue, and continuing the stay pending final disposition of the appeal to this Court.

B. The judgment below and the notice of appeal.

The judgment of the Ohio Supreme Court affirming the PUCO Order was entered on July 25, 1984. A copy of

the judgment is included in the appendix at page A187. Cincinnati Bell filed a notice of appeal to this Court with the Clerk of the Supreme Court of Ohio on July 25, 1984. A copy of the notice of appeal is included in the appendix at pages A188 through A190. In accordance with Rule 12 of this Court, the appeal is being docketed within 90 days from the date of entry of the judgment of the Supreme Court of Ohio.

C. Jurisdiction is conferred by 28 U.S.C. section 1257(1) and (2).

Cincinnati Bell invokes this Court's jurisdiction under 28 U.S.C. section 1257(1) and (2). Section 1257 provides for an appeal to this Court under certain circumstances from the decision of the highest court of a state. The Ohio Supreme Court is the highest court in the State of Ohio.

The Ohio Supreme Court upheld the PUCO Order in the face of Cincinnati Bell's argument that it is repugnant to the Constitution and laws of the United States. Subsection (2) of section 1257 provides for an appeal to this Court when the validity of a "state statute" is questioned as being repugnant to the Constitution, treaties or laws of the United States and is upheld by the highest court in the state. Cincinnati Bell appealed the PUCO Order to the Ohio Supreme Court on the basis that it is repugnant to the Supremacy Clause of the Constitution of the United States, the Preemption Order and 47 U.S.C. section 220 of the Communications Act of 1934. Thus the validity of the PUCO order was questioned as being repugnant to federal law. See the opinion of the Supreme Court of Ohio at page A7 and portions of Cincinnati Bell's briefs below included in the appendix at pages A191-A203.

The PUCO Order is a "state statute" for purposes of 28 U.S.C. section 1257(2) from which an appeal to this Court may be taken. *Ohio Bell Telephone Company v. Public Utilities Commission of Ohio,* 301 U.S. 292 (1937). In that case, the Court permitted an appeal under section 237 of the Judicial Code, a predecessor to 28 U.S.C. section 1257, from a ratemaking and refund order of the PUCO that had been affirmed by the Ohio Supreme Court.

Further, on numerous other occasions this Court has interpreted the term "state statute" as used in section 1257(2) to include administrative orders of a legislative nature. *See, e.g., Atchison, Topeka & Santa Fe Railway Company v. Public Utilities Commission of California,* 346 U.S. 346, 348 (1953); *Jamison v. Texas,* 318 U.S. 413, 417 (1943); *John P. King Manufacturing Co. v. City Council of Augusta,* 277 U.S. 100 (1928); *Ex Parte Williams,* 277 U.S. 267 (1928); *Sultan Railway Timber Company v. Department of Labor and Industries,* 277 U.S. 135 (1928); *Live Oak Water Users' Association v. Railroad Commission,* 269 U.S. 354, 356 (1926); *Lake Erie & Western Railroad Co. v. State Public Utilities Commission,* 249 U.S. 422 (1919). The Ohio Supreme Court long ago concluded that in Ohio ratemaking is legislative in nature. *Newark Natural Gas & Fuel Co. v. Newark,* 92 Ohio St. 393, 399, 111 N.E. 150, 151 (1915), *aff'd,* 242 U.S. 405 (1917). *See also East Ohio Gas Co. v. Cleveland,* 106 Ohio St. 489, 140 N.E. 410 (1922). Accordingly, the PUCO Order below is a "state statute" for purposes of section 1257(2) and that section confers jurisdiction on this Court to hear Cincinnati Bell's appeal.

When the Ohio Supreme Court found the FCC's Preemption Order ultra vires it necessarily was holding it to be invalid. Accordingly, jurisdiction is also conferred on this Court by subsection (1) of section 1257 which

provides for an appeal to this Court where the validity of a "statute of the United States" is placed in question and the highest court in the state decides against its validity. The term "statute of the United States" includes an administrative order of a legislative nature. *Seaboard Air Line Railroad Company v. Daniel*, 333 U.S. 118 (1948). The Preemption Order is legislative in nature.[1] Cincinnati Bell appealed to the Ohio Supreme Court on the basis that the PUCO Order had been preempted by the Preemption Order. See the opinion of the Supreme Court of Ohio at page A7 and portions of Cincinnati Bell's briefs below included in the appendix at pages A191-A203. The PUCO and the OCC argued that the FCC lacked authority to issue the Preemption Order and that therefore the Preemption Order was void. The Ohio Supreme Court agreed with the PUCO and OCC and held that the Preemption Order was ultra vires. See pages A7-A9. Because the validity of the Preemption Order was placed directly in question and the Supreme Court of Ohio ruled against its validity, an appeal is also proper under section 1257(1).

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1. The Preemption Order consisted of two parts: consideration of a petition filed by American Telephone and Telegraph ("AT&T") and of a petition for declaratory judgment filed by General Telephone Company of Ohio ("GTE"). Cincinnati Bell maintains and argued below that the portion of the Preemption Order pertaining to AT&T's petition was legislative in nature but that the portion of the Preemption Order pertaining to GTE's petition was adjudicative in nature. The PUCO and OCC argued below that the entire Preemption Order was legislative in nature. The Ohio Supreme Court specifically held that the Preemption Order "was legislative, as opposed to adjudicative, in nature." See page A7.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Constitutional Provisions

U.S. Cons. art. III, §§ 1 and 2, para. 1:

ARTICLE III

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; —to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Cons. art. IV, § 1:

ARTICLE IV

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

U.S. Cons. art. VI, para. 2:

ARTICLE VI

* * * * *

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Statutes

28 U.S.C. section 1257 (1) and (2):

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

28 U.S.C. section 1738:

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. June 25, 1948, c. 646, 62 Stat. 947.

28 U.S.C. section 2342 (1):

The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

> (1) all final orders of the Federal Communications Commission made reviewable by section 402 (a) of title 47.

47 U.S.C. section 402 (a):

(a) Procedure

Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chap-

ter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28.

Ohio Revised Code section 4903.13, para. 1:

A final order made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable.

STATEMENT OF THE CASE

A. The facts.

On March 1, 1982, Cincinnati Bell filed a rate case, Case No. 81-1338-TP-AIR, with the PUCO seeking authority to adjust its rates and charges for Ohio customers. In its application Cincinnati Bell determined its depreciation expenses utilizing the "remaining life" and "equal life group" depreciation accrual rates that had been prescribed by the FCC for Cincinnati Bell. See pages A74-A75.

Subsequently, by Memorandum Opinion and Order adopted December 22, 1982, the Preemption Order, the FCC held that the states were preempted from prescribing depreciation rates different from those prescribed by the FCC for telecommunications equipment subject concurrently to both state and federal jurisdiction.[2] The Preemption Order appears in the appendix at pages A158 through A186. The PUCO, the OCC and Cincinnati Bell

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2. As a practical matter, most telecommunications equipment is used in both intrastate and interstate communications. *Virginia State Corporation Commission v. Federal Communications Commission*, 737 F.2d at 390, included in the appendix at page A139.

(joining with American Telephone and Telegraph Company and the other Bell System Companies) participated in these proceedings. The finding of the FCC was based on its conclusion that section 220 of the Communications Act preempts the states with respect to equipment subject concurrently to both federal and state jurisdiction and, in the alternative, that it was exercising its legislative authority to mandate such preemption in order to avoid frustration of federal policies.

The Preemption Order was appealed to the United States Court of Appeals for the Fourth Circuit by the Virginia State Corporation Commission. That case is captioned *Virginia State Corporation Commission v. Federal Communications Commission,* 737 F.2d 388 (4th Cir. 1984) (Motion for Rehearing En Banc denied). All parties before this Court (Cincinnati Bell, the PUCO and the OCC) intervened and became parties in the Fourth Circuit appeal of the Preemption Order. The Virginia State Corporation Commission, along with the PUCO, the OCC and the other intervening state regulatory agencies, argued that the FCC lacked authority to preempt the states from prescribing different depreciation rates and that, therefore, the Preemption Order was not a valid order. See page A137. On June 18, 1984, the Fourth Circuit issued a decision in which it upheld the validity of the Preemption Order. The court specifically concluded that preemption by the FCC was a valid exercise of legislative authority. The Fourth Circuit's decision appears in the appendix at pages A131 through A157.

On January 7, 1983, in compliance with the FCC's Preemption Order, the PUCO issued an Opinion and Order (the "Initial Order") in Cincinnati Bell's rate case referred to above, Case No. 81-1338-TP-AIR, wherein the "remaining life" and "equal life group" depreciation accrual rates prescribed for Cincinnati Bell by the FCC were

adopted by the PUCO. The PUCO expressly recognized that it was compelled by principles of federal preemption to adopt these depreciation methods. The Initial Order appears in the appendix at pages A36 through A130.[3]

On February 7, 1983, the OCC filed an Application for Rehearing with the PUCO. The PUCO granted in part the OCC's Application for Rehearing by entering an Entry on Rehearing, dated March 9, 1983. Reversing its prior decision in the Initial Order, the PUCO concluded in the Entry on Rehearing (the "PUCO Order") that it was not bound to follow the FCC's Preemption Order and ordered Cincinnati Bell to calculate its depreciation expenses utilizing the "whole-life" method of calculating depreciation, a different depreciation accrual method from that ordered by the FCC. The PUCO also ordered Cincinnati Bell to utilize different rates under the "equal life group" depreciation method from the rates prescribed by the FCC for Cincinnati Bell. The effect of the PUCO Order was to place Cincinnati Bell in the position of being subject to two binding, yet conflicting, orders respecting the methodology and rates it is required to use in depreciating the same equipment—one from the FCC and one from the PUCO. The PUCO Order appears in the appendix at pages A25 through A35.

On March 9, 1983, Cincinnati Bell filed its appeal to the Ohio Supreme Court. Shortly thereafter, the Ohio Supreme Court granted a motion by Cincinnati Bell for a stay of the PUCO Order pending that appeal. On appeal, Cincinnati Bell argued (1) that the PUCO Order was contrary to federal law in that it prescribed depreciation rates which had been preempted by the FCC's Pre-

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3. The Initial Order addresses numerous issues besides the depreciation issue which are not before the Court on appeal. The depreciation issue is discussed at pages A74-A75.

emption Order and by section 220 of the Communications Act of 1934, (2) that the Ohio Supreme Court did not have jurisdiction to review the validity of the Preemption Order and (3) that the Ohio Supreme Court was bound to give effect to the Preemption Order unless and until it was reversed on appeal by the Court of Appeals of the United States.

On July 25, 1984, one month *after* the Fourth Circuit issued its decision upholding the Preemption Order, the Ohio Supreme Court entered a judgment affirming the PUCO Order. The opinion of the Ohio Supreme Court appears in the appendix at pages A1-A25.[4] In response to Cincinnati Bell's argument that the Ohio Supreme Court was bound to give effect to the Preemption Order by reason of its lack of jurisdiction to review that order, the court held it was exercising jurisdiction to review the PUCO Order, not the Preemption Order. The *sole* authority cited by the Ohio Supreme Court in support of this limited view of its jurisdiction was *Southwestern Bell Telephone Company v. Arkansas Public Service Commission*, No. LRC 84-247 (E.D. Ark. March 30, 1984), *rev'd*, 738 F.2d 901 (8th Cir. 1984), *petition for cert. filed*. The Ohio Supreme Court then proceeded to quote at length the district court's finding in *Southwestern Bell* that the Preemption Order was ultra vires. The Ohio Supreme Court concluded by stating its agreement with the district court's analysis and finding the PUCO Order to be lawful. See pages A7-A9.

However, the Ohio Supreme Court failed to acknowledge that the district court decision in *Southwestern Bell* had been reversed by the Eighth Circuit. *See Southwestern Bell Telephone Company v. Arkansas Public Ser-*

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4. Again, this opinion addresses numerous issues other than depreciation. The depreciation issue, the only issue appealed to this Court, is discussed at pages A2-A9 and A20-A23.

vice Commission, 738 F.2d 901 (8th Cir. 1984), *petition for cert. filed.* The court also ignored the res judicata[5] effect of the Fourth Circuit's prior decision upholding the Preemption Order in *Virginia State Corporation Commission v. Federal Communications Commission,* 737 F.2d 388 (4th Cir. 1984). Indeed, the majority per curiam opinion did not even cite or acknowledge the Fourth Circuit decision. To summarize, the Ohio Supreme Court simply refused to apply federal decisions, federal statutes and a federal administrative order.

In a concurring opinion, Chief Justice Celebrezze of the Ohio Supreme Court did acknowledge that the Fourth Circuit had upheld the Preemption Order in *Virginia State Corporation Commission.* He stated that a majority of the Ohio Supreme Court would not acknowledge federal preemption of matters traditionally subject to state regulation absent specific congressional intent or a judicial declaration binding on the Ohio Supreme Court. See page A20. Thus, although acknowledging that the Fourth Circuit already had decided the very issue of preemption that the Ohio Supreme Court was now deciding, a majority of the Ohio Supreme Court concluded that the Fourth Circuit's decision was not entitled to res judicata effect. He also stated that the Ohio Supreme Court did not have jurisdiction to enforce the Preemption Order and, that, therefore, the PUCO Order would be enforced because it conformed to Ohio law. See page A21.

Justice William B. Brown dissented, arguing that the majority's "callous disregard" of the decision released by the Fourth circuit, to which the parties in this action were parties, was ill-advised. Justice Holmes concurred in this dissent. See pages A21-A23.

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5. The term res judicata is used throughout this Statement to include collateral estoppel.

The Ohio Supreme Court's decision complicated Cincinnati Bell's already precarious position. Cincinnati Bell was not only subject to conflicting state and federal administrative orders, it now also became subject to conflicting state and federal court orders—those of the Ohio Supreme Court and the Court of Appeals for the Fourth Circuit. Accordingly, Cincinnati Bell immediately filed a notice of appeal to this Court. A copy of the Notice of Appeal to the Supreme Court of the United States appears in the appendix at pages A188-A190.

B. Raising the questions below.

This appeal presents two questions for the Court's review. These questions are as follows: (1) Whether the Ohio Supreme Court was required to give res judicata effect to the decision of the Fourth Circuit upholding the validity and preemptive effect of the FCC's Preemption Order, and (2) whether the Ohio Supreme Court was required to give effect directly to the Preemption Order. Both questions were raised and argued below.

The first question, involving res judicata, was raised in the Ohio Supreme Court in Cincinnati Bell's brief on the merits, see pages A191-A199, and in its reply brief, see pages A200-A203. This question was initially raised with respect to the res judicata effects of the Preemption Order itself as an administrative decision. Specifically, Cincinnati Bell's first proposition of law in its brief on the merits stated:

> When the issue of federal preemption of state prescribed depreciation rates has been decided adversely to the PUCO in an administrative proceeding to which the PUCO was a party, the PUCO is bound by principles of res judicata to give effect to that administrative decision.

See page A195. The argument and authority advanced by Cincinnati Bell in support of that proposition are set forth in the appendix at pages A195-A199.

Cincinnati Bell also emphasized in both briefs that the Fourth Circuit review proceeding was pending and that the PUCO, OCC and Cincinnati Bell were parties to that proceeding. In its reply brief Cincinnati Bell pointed to the Fourth Circuit case and stated that the decision of the Fourth Circuit would be binding on the parties in the Ohio Supreme Court. See page A203. Further, on June 19, 1984, the day after the Fourth Circuit rendered its decision, Cincinnati Bell sent a copy of that decision to the Ohio Supreme Court and argued that it was "dispositive of the depreciation issues pending before the [Ohio] Supreme Court." See pages A204-A205.

The per curiam opinion of the Ohio Supreme Court did not mention the Fourth Circuit decision nor did it explain why that decision was not being given res judicata effect.[6] The majority said only that the Preemption Order itself was not to be given res judicata effect because it was legislative and not adjudicative. See pages A6-A7. However, Chief Justice Celebrezze's concurring opinion specifically discussed the Fourth Circuit decision stating that a majority of the court would not uphold the Preemption Order absent specific congressional intent or a decision of a court with authority to bind the Ohio Supreme Court. See page A20. It must be inferred that a majority of the Ohio Supreme Court did not consider the Fourth Circuit decision to be binding even though it involved the same issue and all parties to the Ohio Su-

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6. This Court has held that the lower court's failure to rule on an issue before it does not preclude this Court from addressing that issue. *Des Moines Navigation & Railroad Company v. Iowa Homestead Company*, 123 U.S. 552, 555-56 (1887).

preme Court appeal were parties to the Fourth Circuit proceeding.

The second question presented for review by this Court is whether, regardless of res judicata principles, the Ohio Supreme Court is required to give effect to the FCC's Preemption Order by reason of the Supremacy Clause (Article VI, para. 2) of the Constitution of the United States and 28 U.S.C. section 2342(1) and 47 U.S.C. section 402(a).

That the Ohio Supreme Court must give effect to the order of the FCC was unequivocally raised below. Cincinnati Bell stated in its brief on the merits that:

> Even absent principles of res judicata, the Court must find, under well established judicial standards for determing the issue of federal preemption, that the FCC has preempted the PUCO's authority to prescribe depreciation rates inconsistent with those prescribed by the FCC. It has long been an established principle of constitutional law that the Supremacy Clause (Article VI, clause 2) of the Constitution of the United States mandates that federal law preempts state law where there is a conflict between the two.

See page A199.

Cincinnati Bell also argued below that:

> . . . neither the PUCO nor this Court has the jurisdiction to review the FCC Preemption Order and pass upon its merits. The United States Courts of Appeals have exclusive jurisdiction under the Communications Act and the Administrative Orders Review Act to review final orders of the FCC. *Compare* 47 U.S.C. § 402(a) *with* 28 U.S.C. § 2342; *City of Peoria v. General Electric Cablevision Corp.* (7th Cir. 1982), 690 F.2d 116. Thus, unless and until the FCC Preemption Order is overruled by the United States Court of Ap-

> peals for the Fourth Circuit, it still is a final and binding order not subject to collateral attack by the PUCO or the OCC, either in the PUCO Rehearing Order or in this Court. . . . It follows that this Court should find that the PUCO erred to the prejudice of Cincinnati Bell in the PUCO Rehearing Order when it failed to give effect to the FCC Preemption Order and that the PUCO Rehearing Order thus is unlawful insofar as it purports to prescribe depreciation accrual rates for Cincinnati Bell which differ from those prescribed by the FCC.

See pages A198-A199.

The Ohio Supreme Court's response to this argument was two-fold. First, the Ohio Supreme Court quoted with approval the district court's conclusion in *Southwestern Bell* that the Preemption Order was ultra vires. See pages A7-A9. Thus, the Ohio Supreme Court refused to give effect to the Preemption Order for this reason. Second, although inconsistently, the Ohio Supreme Court acknowledged that it lacked jurisdiction to determine the validity of the Preemption Order. The court specifically said it was reviewing the PUCO Order, not the FCC order, and it then proceeded to find the PUCO Order "reasonable and lawful" in the face of the conflicting Preemption Order. See page A7. Thus, the court simply refused to give effect to the Preemption Order. This position was articulated by Chief Justice Celebrezze in his concurring opinion. He stated that the Ohio Supreme Court does not have jurisdiction to give effect to the Preemption Order and that, because the PUCO Order is in conformity with Ohio law, it is valid. See page A21.

Thus, both questions presented for this Court's review were raised below and rejected by the Ohio Supreme Court.

THE QUESTIONS ARE SUBSTANTIAL

This appeal presents substantial federal questions. The first question in its most basic form is whether a state court must give res judicata effect to the judgment of the United States Court of Appeals involving the same parties and issue. It is not an exaggeration to say that this question involves principles fundamental to our system of federalism as outlined in the Constitution.

The second question is, in its simplest form, whether a state court is required to give effect to an FCC order by reason of the Supremacy Clause. Congress vested the Court of Appeals with exclusive jurisdiction to review FCC orders; accordingly, state courts are deprived of jurisdiction to review the validity of FCC orders. Therefore, must not the states give effect to a final FCC order unless and until the order is reversed by the Court of Appeals? This question addresses the viability of the scheme of exclusive review established by Congress. More importantly, the Ohio Supreme Court's open refusal to give effect to the FCC's Preemption Order, that is, to apply federal law, attacks head-on the continued vitality of federal supremacy.

While these questions are substantial and have fundamental implications, prior decisions of this Court demonstrate that the Ohio Supreme Court committed gross error in ruling upon them against Cincinnati Bell. Accordingly, Cincinnati Bell respectfully submits that it is appropriate for the Court summarily to reverse the decision of the Ohio Supreme Court. Plenary consideration of this appeal is essential only if the Court is inclined to review the continued validity of numerous decisions of this Court and the well-established principles discussed below. If the Court is not so inclined, prior de-

cisions of this Court permit summary reversal. If the Court, however, is inclined to review the decisions and principles discussed below, Cincinnati Bell urges the Court to order briefing on the merits and oral argument for the reason that the questions presented involve long standing principles governing the relationship between the state and federal governments and the authority of the federal judiciary—principles which are fundamental to our Constitution and system of federalism.

A. The Supreme Court of Ohio was required to give res judicata effect to the judgment of the Fourth Circuit.

In numerous cases, this Court has been confronted with the question of whether and to what extent state courts must give res judicata effect to the judgments of federal courts. The Court has consistently stated that this question raises a federal question subject to review by the Court. *See, e.g., Stoll v. Gottlieb,* 305 U.S. 165, 167 (1938); *Myers v. International Trust Company,* 263 U.S. 64, 69 (1923); *West Side Belt Railroad Co. v. Pittsburgh Construction Company,* 219 U.S. 92, 99 (1911); *Virginia-Carolina Chemical Company v. Kirven,* 215 U.S. 252, 257 (1909); *Deposit Bank of Frankfort v. Board of Councilmen of Frankfort,* 191 U.S. 499, 514-15 (1903); *Embry v. Palmer,* 107 U.S. 3, 8-9 (1883); *Dupasseur v. Rochereau,* 88 U.S. (21 Wall.) 130, 131 (1875). Here, the federal question takes on added importance because of the direct conflict between the Ohio Supreme Court and the Fourth Circuit on the validity of the FCC's Preemption Order, an issue of central importance to the structure of the telecommunications industry.

In these cases, as well as others, the Court has repeatedly held that state courts must give res judicata ef-

fect to decisions of federal courts. *See, e.g., Stoll v. Gottlieb,* 305 U.S. 165 (1938); *Myers v. International Trust Company,* 263 U.S. 64, 69 (1923); *West Side Belt Railroad Co. v. Pittsburgh Construction Company,* 219 U.S. 92 (1911); *Virginia-Carolina Chemical Company v. Kirven,* 215 U.S. 252 (1909); *Deposit Bank of Frankfort v. Board of Councilmen of Frankfort,* 191 U.S. 499 (1903); *Des Moines Navigation & Railroad Company v. Iowa Homestead Company,* 123 U.S. 552 (1887); *Crescent City Live-Stock Co. v. Butchers' Union,* 120 U.S. 141 (1887); *Embry v. Palmer,* 107 U.S. 3 (1883); *Dupasseur v. Rochereau,* 88 U.S. (21 Wall.) 130 (1875); *M'Cormick v. Sullivant,* 23 U.S. (10 Wheat.) 192 (1825); *Gelston v. Hoyt,* 16 U.S. (3 Wheat.) 246 (1818). *See generally* Degnan, *Federalized Res Judicata,* 85 YALE L.J. 741 (1976); 18 C. WRIGHT, A. MILLER AND E. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 1468, at 648-49. Indeed, on the same day that the Ohio Supreme Court issued its decision in the case at bar, it decided *Efros v. Nationwide Corp.,* 12 Ohio St. 3d 191, 193, 465 N.E.2d 1309, 1311 (1984), in which it also acknowledged this proposition; the court said "[B]oth the federal and state courts may proceed concurrently with the litigation, at least until judgment is obtained in one of them which may be raised as *res judicata* as to the other."

Although the principle that state courts must give res judicata effect to decisions of federal courts is firmly established, it is clear that no provision of the Constitution or federal law explicitly so states.[7] The Court has,

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7. The full faith and credit clause makes no mention of the states giving due effect to the judicial proceedings of the federal government. U.S. Cons. art. IV, § 1. This omission may well have been due to the compromise by the Framers leaving it for Congress to create inferior federal courts. 18 C. WRIGHT, A. MILLER AND E. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 1468, at 649.

therefore, indicated that this principle of preclusion has its roots in a number of places, including the full faith and credit statute, *Embry v. Palmer*, 107 U.S. at 9-10, the inherent judicial power of the United States under Article III, *Dupasseur v. Rochereau*, 88 U.S. at 131, and the federal common law doctrine of res judicata, *Stoll v. Gottlieb*, 305 U.S. at 171. This principle is also dictated by the concept of federalism, supremacy, and the full faith and credit clause. *See generally Metcalf v. Watertown*, 153 U.S. 671, 676-77 (1894); 18 C. WRIGHT, A. MILLER AND E. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 1468, at 649-50. Regardless of which provision of the Constitution or federal law mandates preclusion, it is manifestly clear as the Court has held throughout this country's history that preclusion is mandated. *Id; see generally* THE FEDERALIST No. 80 (A. Hamilton) (E. Scott ed. 1894).

The application of the above principles to this case is not affected by the issue of whether Ohio or federal res judicata law applies. Applying either law, the decision of the Fourth Circuit upholding the Preemption Order is binding on the Ohio Supreme Court. Ohio has maintained traditional res judicata requirements: "[A] point of law or a fact which was actually and directly in issue in the former action, and was there passed upon and determined by a court of competent jurisdiction, may not be drawn in question in a subsequent action between the same parties or their privies." *Trautwein v. Sorgenfrei*, 58 Ohio St. 2d 493, 391 N.E.2d 326 (1979); *see also Goodson v. McDonough Power Equipment, Inc.*, 2 Ohio St. 3d 193, 443 N.E.2d 978 (1983). Federal res judicata law differs from Ohio law only in that the mutuality requirement has been relaxed in some circumstances. *See Parklane Hosiery Company, Inc. v. Shore*, 439 U.S. 322 (1979).

Here, the traditional res judicata requirements are satisfied. The validity of the Preemption Order was "actually and directly in issue" in the Fourth Circuit. The Fourth Circuit determined the Preemption Order and its preemptive effect on the PUCO to be valid and to bar the state ratemaking agencies, including the PUCO, from prescribing depreciation rates which are inconsistent with those prescribed by the FCC. Cincinnati Bell appealed to the Ohio Supreme Court specifically on the basis that the PUCO Order was contrary to the Preemption Order in that it prescribed rates which were inconsistent with those prescribed by the FCC. By way of defense, both the PUCO and the OCC argued that the Preemption Order was invalid and, therefore, not binding on the PUCO. Accordingly, any decision in favor of the validity of the PUCO Order necessarily included a finding that the Preemption Order was invalid. In fact, this is exactly what the Ohio Supreme Court did when it stated its agreement with the district court's finding in *Southwestern Bell* that the Preemption Order was "ultra vires." Thus, the same issue that was before the Ohio Supreme Court had previously been determined by the Fourth Circuit. Likewise, all parties in the Ohio Supreme Court (Cincinnati Bell, the PUCO and the OCC) were also parties to the proceedings in the Fourth Circuit.

Therefore, principles of res judicata coupled with the Constitution and laws of the United States, as well as numerous decisions of this Court, required that the Ohio Supreme Court give effect to the Fourth Circuit judgment upholding the Preemption Order. The Ohio Supreme Court's failure to give res judicata effect to the Fourth Circuit judgment was in error.

B. The Supreme Court of Ohio was required to give effect to the FCC's Preemption Order.

Recently, this Court held in *Federal Communications Commission v. ITT World Communications, Inc.*, ... U.S. ....., 104 S. Ct. 1936 (1984), that the United States Court of Appeals has exclusive jurisdiction under 28 U.S.C. section 2342(1) and 47 U.S.C. section 402(a) to review final FCC orders. In that case the Court ruled that a federal district court does not have jurisdiction to entertain a suit to enjoin FCC action as ultra vires. In the case at bar, the Ohio Supreme Court decided that it had jurisdiction to determine whether the FCC's Preemption Order was ultra vires. The court explicitly agreed with the district court's decision in *Southwestern Bell Telephone Company v. Arkansas Public Service Commission,* No. LRC 84-247 (E.D. Ark. March 30, 1984), *rev'd,* 738 F.2d 901 (8th Cir. 1984), *petition for cert. filed,* which had held the Preemption Order to be ultra vires. See pages A7-A9. This exercise of jurisdiction by the Ohio Supreme Court was gross error. *See Federal Communications Commission v. ITT World Communications, Inc.*, ... U.S. ....., 104 S. Ct. 1936 (1984); *Port of Boston Marine Terminal Association v. Rederiaktiebolaget Transatlantic,* 400 U.S. 62 (1970); *Tacoma v. Taxpayers of Tacoma,* 357 U.S. 320 (1958); *Gelston v. Hoyt,* 16 U.S. (3 Wheat.) 246, 313 (1818). Indeed, this exercise of jurisdiction by the Ohio Supreme Court is in direct conflict with *Southwestern Bell Telephone Company v. Arkansas Public Service Commission,* 738 F.2d 901 (8th Cir. 1984), *petition for cert. filed.*

The Ohio Supreme Court also concluded that it simply was not obliged to give effect to the Preemption Order. It responded to the argument that it lacked jurisdiction under 28 U.S.C. section 2342(1) and 47 U.S.C. section 402(a) by saying that it was reviewing the PUCO Order, not the Preemption Order. See page A7. The court then went on to conclude that the PUCO Order was reasonable and lawful. See page A9. The Ohio Supreme Court's decision to ignore altogether the binding effect of the Preemption Order was summarized in the concurring opinion of Chief Justice Celebrezze:

> The unanswered question is whether the FCC rule will be enforced against the states so as to preempt the states' power to fix depreciation allowances in telecommunications cases. This court is without jurisdiction to make that essential determination and, accordingly, the majority's decision is based upon the fact that the commission's order is in conformity with Ohio's rate-making statutes.

See page A21. This position raises a fundamental question that was not before the Court in *ITT World Communications*. That is, must a state court give effect to an order of the FCC unless and until that order is invalidated by a court having jurisdiction to do so?

Contrary to the opinion expressed by the Ohio Supreme Court, fundamental and essential principles of supremacy dictate that the Ohio Supreme Court was required to give effect to the Preemption Order. U.S. Cons. art. VI, para. 2. This Court has held in a different context that state courts are bound to give effect to rulings of a federal agency where they do not have jurisdiction to re-

view rulings of that agency. *See Marine Engineers Beneficial Association v. Interlake Steamship Company,* 370 U.S. 173 (1962). Moreover, the Supremacy Clause requires that state courts enforce and apply federal law. *See, e.g., Testa v. Katt,* 330 U.S. 386 (1947); *Mondou v. New York, New Haven & Hartford Railroad Co.,* 223 U.S. 1 (1912). Yet in this case, the Ohio Supreme Court disregarded the federal law that it was obliged to enforce.

The Ohio Supreme Court had jurisdiction under Ohio Revised Code section 4903.13 to determine whether the PUCO Order was "unlawful." The question presented by this issue is whether the Supremacy Clause making federal law the supreme Law of the Land and its declaration that "the Judges in every State shall be bound thereby" required the Ohio Supreme Court to enforce the Preemption Order. The answer to this question must be "yes" if the concept of supremacy is to have meaning. Therefore, the Ohio Supreme Court committed gross error in failing to give effect to the Preemption Order, permitting this Court summarily to reverse the decision below. At the very least, the Ohio Supreme Court's open refusal to apply federal law, and the underlying implications of this refusal, mandate that this Court review by plenary consideration the question of whether state courts are required to give effect to an FCC order unless and until that order is held invalid by a court of competent jurisdiction. Here, only the United States Court of Appeals has jurisdiction to determine the validity of an FCC order.

CONCLUSION

This case reveals a "callous disregard" of federal law by the State of Ohio.

The Public Utilities Commission of Ohio violated the Federal Communications Commission's Preemption Order by ordering Cincinnati Bell to utilize a different depreciation methodology than that prescribed for Cincinnati Bell by the FCC. The validity of the Preemption Order was questioned by the PUCO in an appeal which was pending in the United States Court of Appeals for the Fourth Circuit. However, the PUCO did not seek a stay of the Preemption Order from that court. Instead, it simply continued in its violation of the order.

Cincinnati Bell then sought relief from the PUCO Order by appealing to the Ohio Supreme Court. While that appeal was pending the Court of Appeals for the Fourth Circuit exercised its exclusive jurisdiction, upholding the validity of the Preemption Order. The PUCO not only continued to violate the Preemption Order, it then proceeded to disregard the Fourth Circuit decision. The Ohio Supreme Court, in turn, disregarded the Fourth Circuit decision and rendered its decision upholding the PUCO's violation of the Preemption Order. Cincinnati Bell then filed this appeal as its last resort to obtain protection from the PUCO's violation of federal law.

The Supreme Court of the United States has jurisdiction to review the questions presented by this appeal under 28 U.S.C. section 1257(1) and (2). Moreover, this appeal raises substantial federal questions. These questions include whether state courts must give res judicata effect to federal judgments and whether state courts must give effect to an FCC order unless and until that order

is invalidated by a court of competent jurisdiction. Four factors significantly increase the importance of these questions: (1) the direct conflict between the Ohio Supreme Court and the United States Court of Appeals for the Fourth Circuit; (2) the direct conflict between the Ohio Supreme Court and the United States Court of Appeals for the Eighth Circuit; (3) the importance of the issues in this case to the telecommunications industry; and (4) the precarious position in which Cincinnati Bell is placed because it is subject to conflicting PUCO and FCC orders as well as conflicting state court and federal court orders.

Because prior decisions of this Court demonstrate that the Ohio Supreme Court committed gross error, Cincinnati Bell respectfully requests that the Court summarily reverse the decision below. If, however, the Court is inclined to review the case law and principles discussed above, then, because of the gravity of the issues in this case, plenary consideration of this appeal is essential. In this circumstance, Cincinnati Bell urges the Court to note probable jurisdiction and set the case for briefing and argument on the merits.

Respectfully submitted,

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